
CHICAGO BAR
ASSOCIATION

51447

PEOPLE OF THE STATE OF ILLINOIS, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
ALONZO ROLAND, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crime of burglary and was sentenced to a term of four to ten years in the penitentiary. He prosecutes this appeal, maintaining that the trial judge erred in denying his pretrial motion to suppress certain evidence recovered from the possession of a witness allegedly discovered as a direct result of an illegal search of defendant's home.

The following facts emerged from the hearing on the motion to suppress and from the trial of the cause:

Defendant was released from the penitentiary on July 10, 1964 on parole from the sentence of a prior conviction. Defendant's parole officer, Theodore Strickland, had thereafter attempted to contact him on two separate occasions at or after 11:00 P.M., but to no avail. The hour of 11:00 P.M. being defendant's curfew hour as a parolee, Strickland telephoned him on October 2, 1964 and ordered him to appear at the parole office in connection with the violations. Upon his arrival at parole headquarters defendant was ordered to remove the contents of his pockets, and one of the items removed was a bank book. The size of the balance of the account, in view of the short period of time defendant had been out of the penitentiary and of defendant's unsatisfactory explanation of how he came to amass such a considerable amount in that period, and an erasure of the original depositor's name on the book caused Strickland to become suspicious and, after the matter

was investigated, it was learned that the bank book had been taken in a burglary.

Defendant was detained at parole headquarters and on October 6, 1964, Chicago Police Officers Porrevecchio and Petrosius of the Burglary Division transported defendant to Area 3 headquarters where he was questioned. Both police officers testified that they requested of defendant, and defendant gave them permission to enter and to search his apartment. The officers stated they requested a key to the apartment from defendant. Defendant told them he had no key in his immediate possession, but that they could secure a key from the landlady of the building where he resided. The officers went to the building, at 48th Street and South Park Boulevard, where they requested and received a key from the landlady but found that the key did not fit the door lock to defendant's apartment. The officers testified they returned to police headquarters and informed defendant they were unable to gain entrance to his apartment, and defendant told them they could secure a key to the apartment from Juanita Williams, the operator of a cocktail lounge near 43rd Street and Prairie Avenue.

The officers proceeded to the lounge and secured a key to defendant's apartment from Juanita Williams and at that time she informed the officers that defendant had telephoned from the police station shortly prior thereto and requested her husband, Clarence Williams, to go to defendant's apartment and remove a television set and a coin collection. The officers proceeded to the tailor shop operated by Clarence Williams, located near his wife's cocktail lounge, and Williams turned over to the officers a television set and a coin collection belonging to defendant which were situated in the tailor shop and which Williams stated he removed from defendant's apartment at defendant's request. A search without a warrant was later made of defendant's apartment and a dog statuette,

a pair of binoculars, and other items were seized. It was thereafter determined that these items as well as other items of value, including a woman's wristwatch which defendant's girlfriend testified defendant gave her, were stolen from the apartment of Mr. Arthur Jones on September 3, 1964.

After the hearing on the motion to suppress, the trial judge sustained the motion as to all the items seized from defendant's apartment by the police officers for the reason that the judge did not believe the police officers' testimony that they received permission from defendant to enter and to search his apartment. The motion was denied as to all the other items seized.

Defendant raised the defense at trial that the items seized by the officers did not belong to him, but were temporarily stored in his apartment for safekeeping by a man named Woodson because Woodson had some business to care for and did not want to leave the items in his automobile. As to the wristwatch, defendant claimed he purchased it for the sum of $5.00 (which he testified he received from his girlfriend) from a person who came to his apartment door seeking to sell the watch. It also appears that prior to the time he left to see his parole officer on October 2nd, defendant entrusted the key to his apartment to Juanita Williams, giving as the reason therefore that he had an appointment with his parole officer, was not certain how long he would be detained, and wanted Juanita Williams to care for the property in the apartment.

Defendant maintains that since the trial judge stated he did not believe the testimony of the police officers that they received permission from defendant to enter and search his apartment, all of the items discovered by them, including the television set, should have been suppressed as evidence. The argument is made that because the officers "embarked on a course of illegal conduct" in

determining where defendant lived and in securing a key to his apartment, the evidence obtained through Clarence and Juanita Williams, namely the television set, should have been suppressed as the "fruit of the poison tree." We disagree.

Apart from the determination by the trial judge with respect to the credibility of the police officers' testimony concerning the permission they allegedly received from defendant to enter and to search his apartment, it is undisputed, and defendant himself admitted that he informed the police officers of the existence and the whereabouts of Clarence and Juanita Williams. It is further undisputed that defendant requested and permitted Clarence Williams to enter his apartment and to take possession of the television set and that thereafter Williams removed it to his own premises. The officers consequently learned, independently of and apart from the search of defendant's apartment, that defendant had requested and permitted Clarence Williams to enter his apartment and remove certain items of personal property. Williams had lawful possession of the television set, the television set was on premises occupied by Williams when the officers arrived, and Williams clearly had the authority to consent to the officers' seizure thereof.

Defendant's attempt to analogize the facts in the instant case to a situation which would give rise to an application of the "fruit of the poison tree" doctrine is unavailing. Officers Porrevecchio and Petrosius neither acquired the television set from the defendant's apartment, nor did they learn of its existence through anything which they found as a result of the search of the apartment. The fact that the trial judge disbelieved the officers' testimony that defendant gave them permission to enter and to search his apartment has no bearing on the fact that defendant himself informed the officers of the existence and the

whereabouts of Juanita Williams and of Clarence Williams, on whose property and in whose possession the television set was found. Neither is a claim made nor does any evidence exist in the record that the information concerning Clarence and Juanita Williams was in any way forced or coerced from defendant by the officers. On the contrary, it is quite apparent defendant gave this information to the officers freely and voluntarily during the course of his conversation with them. The cases cited by defendant in support of this position represent classic examples of evidence which was discovered as the result of an unlawful search or arrest and which the courts held should have been suppressed. See Wong Sun v. United States, 371 U. S. 471, and People v. Albea, 2 Ill. 2d 317. The facts in the case at bar, however, do not admit of the application of that doctrine.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

McNamara, J., and Lyons, J., concur.

51583

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. SOLOMON DAWSON, (Impleaded), Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the unlawful possession of narcotics and was sentenced to a term of seven years to twenty years in the penitentiary. He prosecutes this appeal, maintaining he was not proven guilty beyond a reasonable doubt.

Chicago Police Officer Thomas Bowen testified that he and his partner, Officer Ronald Uginchus, were proceeding in an unmarked squad car in an easterly direction on Marquette Road approaching Halsted Street in the early morning of January 15, 1965. The area was well lighted and the artificial lighting was enhanced by a blanket of snow. As the squad car crossed Halsted Street the officers observed a 1956 Chevrolet automobile traveling westerly on Marquette Road approaching Halsted Street, bearing no front license plate. Officer Uginchus made a U-turn into an alley east of Halsted Street and followed the Chevrolet in an attempt to halt the latter vehicle. As the squad car approached within ten feet of the Chevrolet, Officer Bowen testified he observed the right door of the Chevrolet open slightly, a hand come out of the doorway, and a small package fall from the hand to the pavement.

Officer Bowen recovered the package, field tested its contents and found it to contain a green substance resembling marijuana; it was later found upon chemical analysis that the contents of the package was in fact marijuana. The officers

pursued the Chevrolet and succeeded in curbing the vehicle some two blocks west of Halsted Street. Defendant Solomon Dawson was seated on the passenger's side of the vehicle and his brother, Lorenzo Dawson, was driving. The two men were questioned concerning the package and both denied any knowledge with regard thereto. Both men were arrested and charged with unlawful possession of narcotics. The reason given by Officer Bowen for the arrest of both men on the charge of unlawful possession was that the officers were uncertain which of the two men had in fact dropped the package.

Officer Uginchus testified that he was driving the squad car on the morning in question and that after he executed the U-turn into the alley east of Halsted Street he approached some ten feet behind and to the right of the Chevrolet. The officer stated he observed the right door of the Chevrolet open slightly, and a hand come out of the doorway and drop a small package to the pavement. The officer further testified that, from what he was able to observe and determine from his position inside the squad car, the driver of the Chevrolet was apparently taller than the passenger,which later proved to be true, and that the driver of the Chevrolet was sitting in a "normal driving position," whereas the passenger was "bent towards the door." Both officers testified that no one entered or exited the Chevrolet from the time they first observed the vehicle until they placed the occupants under arrest.

The State called Lorenzo Dawson as its witness and he testified that he was proceeding westerly in his automobile on Marquette Road on the morning in question and had stopped his automobile for a traffic light at the Halsted Street intersection. He stated that the front license plate of his automobile was missing for the reason that it had almost fallen off prior thereto and

that he removed it, intending to replace it the following day. The witness testified that, while he was waiting for the traffic light to change, he observed Officers Bowen and Uginchus proceeding in a southerly direction on Halsted Street and then make a left turn easterly onto Marquette Road. He stated that he told defendant to open the right door of the Chevrolet and see if the officers were following them. The reason the witness gave for having told defendant to look out the door was that the "back window was covered over." He stated he had no knowledge of the package shown to him by the officers and that he neither saw defendant drop nor knew if defendant dropped a package from the door of the vehicle.

Defendant testified in his own behalf and stated that he opened the right door of the Chevrolet to see if the officers were following his brother's automobile after he observed the squad car. He denied dropping a package from the vehicle and further denied he was in possession of narcotics on the date in question.

While it is true that the prosecution must establish beyond reasonable doubt that a person accused of the offense of unlawful possession of narcotics was in the immediate and exclusive control thereof, and that he had knowledge of the presence of the narcotics, it is not necessary that the accused be proven to have had the actual physical possession of the narcotics, but it will suffice that it be shown he had constructive possession thereof and, by evidence of acts, declarations and conduct of the accused, that he had the requisite knowledge of the presence of the narcotics. People v. Connie, 52 Ill. App. 2d 221, 226-227. Furthermore, it is well settled that the credibility of the witnesses and the weight to be accorded their testimony is a matter for determination by the trier of fact. Where the evidence is merely conflicting or unless the decision of the trier of fact

in this regard is, from the evidence, manifestly or palpably erroneous, the reviewing court will not disturb that determination. People v. Scott, 34 Ill. 2d 41; People v. Oparka, 85 Ill. App. 2d 33; People v. Hill, 61 Ill. App. 2d 16.

The testimony of Officers Bowen and Uginchus clearly establish that defendant had knowledge that the package dropped from the Chevrolet contained narcotics and that it is reasonably and conclusively inferable that it was defendant who in fact dropped the package from the vehicle. Both officers testified they observed the Chevrolet proceeding in a westerly direction on Marquette Road, bearing no front license plate. The officers thereupon gave chase and approached to within ten feet of the Chevrolet. In a well lighted area both officers observed the right door of the Chevrolet open slightly and a hand come out of the doorway close to the pavement and drop a small package containing what was later found to be marijuana. The officers pursued the Chevrolet and succeeded in bringing it to a halt some two blocks away. It then developed that defendant was seated on the passenger side of the vehicle and that his brother was driving.

The officers at all times had the Chevrolet in sight. No one entered or exited the vehicle from the time they first observed it until the arrests were made. There is no evidence that any one other than defendant and his brother occupied the Chevrolet during that period of time. Defendant's brother was driving the vehicle and was seated in a "normal driving position." Defendant, on the other hand, was "bent towards the door." It would have been a physical impossibility for defendant's brother, an apparently physically normal, 5-foot, 8 or 9-inch tall human being, to have reached over to the passenger side of the vehicle, open the right door and extend his hand almost to the pavement on

the right side of the vehicle in order to drop the package, while yet remaining in a "normal driving position." The sole inference which could be reached from this evidence is that the hand which the officers saw drop the package from the right doorway of the vehicle belonged to defendant. The fact that the officers were uncertain whose hand dropped the package and the fact that both men were charged with unlawful possession of narcotics are of little importance in light of the foregoing. (See People v. Richardson, 21 Ill. 2d 435, where the defendant's conviction on the charge of unlawful possession of narcotics was affirmed on appeal although one of the police officers who arrested defendant did not testify he observed defendant actually throw the packet of narcotics which another officer later retrieved, but testified he only observed defendant make a throwing motion with his arm.)

Defendant states that if his version of the occurrence is to be believed, then the evidence given by the police officers is inherently improbable. This position again overlooks the fact that the question of the credibility of the witnesses is a matter for the trier of fact; it is quite obvious that the trial court chose to believe the account of the occurrence given by the police officers and we are unable to say that it was error for him to do so. The fact that the officers stated they observed the respective seating positions of the occupants of the Chevrolet, impliedly through the rear window of the Chevrolet, whereas defendant's brother testified that the rear window was "covered over," does not of itself impair the credibility of the officers' testimony. This again was a question for the trier of fact to determine.

The cases cited by defendant in support of his position that the evidence fails to prove he had possession of the package which was retrieved by the police officers are not in point. In

People v. Jackson, 23 Ill. 2d 360, defendant locked herself in a bathroom after a narcotics agent had announced his office. After the agent succeeded in entering the bathroom, no narcotics were found either on the person of the defendant or in the bathroom. A package containing narcotics was found at the bottom of a stairwell below the bathroom window. However, it appears that several windows from other apartments in the building also opened onto the stairwell and no definite connection was made between the defendant and the narcotics found at the bottom of the stairwell. In reversing the defendant's conviction for unlawful possession of narcotics, the court stated that although there existed a strong possibility, and perhaps even a probability that the defendant and the narcotics were connected, this alone did not suffice to support the conviction. In the case at bar, on the other hand, both officers observed a hand reach out of the right doorway of the Chevrolet and drop a package later found to contain narcotics, and the evidence introduced can admit of no doubt that the hand belonged to the defendant. In People v. Nelson, 18 Ill. 2d 298, the reviewing court concluded that the testimony of the State as to the crucial occurrence could not be reconciled and that on the state of the record it was impossible to say that the defendant was proved guilty beyond a reasonable doubt. We do not think that the holding of the Nelson case is helpful in the decision of the instant case.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

McNamara, J., and Lyons, J., concur.

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NO. 67-108

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

SALLY D. DEAR, Plaintiff-Appellant	)	Appeal from the Circuit Court for the 18th Judicial Circuit, DuPage County, Illinois.
vs.	)	
RALPH C. DEAR, Defendant-Appellee	)	

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Plaintiff appeals pro se from an order granting an injunction without notice and without bond.

The plaintiff filed a complaint for divorce in 1960. As far as we are able to determine from the record before us, nothing further occurred herein until August 12, 1967, when the defendant filed a verified petition alleging that the plaintiff and the children of the parties "have been physically picketing the premises of the defendant's employer", "disturbing the defendant's employer's business operations and harassing customers attempting to enter and leave the premises." No other allegations appear in the petition. The prayer of the petition was for the issuance of a writ of injunction against only the plaintiff.

Contemporaneous with the defendant's filing of the petition, and without taking evidence, the court entered an order issuing a writ of injunction against the plaintiff and the children without notice or bond. Except for the fact that the prohibition of the injunction writ extended to the children as well as to the plaintiff, the injunction by its terms conformed to the prayer of the petition therefor, and is permanent in duration.

Plaintiff urges that the record was insufficient to justify the issuance of the injunction, particularly without notice or bond; that the issuance of the injunction violated plaintiff's freedom of speech and due process of law; and that the lower court had no jurisdiction to order the injunction.

The defendant filed no brief or other documents in response to the appeal, and neither party offered oral argument.

The failure of the defendant to have given notice and bond, on the facts presented, should have been a bar to granting his injunctive relief. Section 9 of the Injunction Act (Ill. Rev. Stat. 1967, Ch. 69, Sec. 9) specifically provides that the moving party give bond upon such conditions and with such security as may be required by the court or judge. Prior to August 7, 1967, this statute contained a proviso whereby the court, "for good cause shown," may grant the injunction without bond, but this proviso was deleted by amendment five days before the filing of the petition below. In any event, a search of the entire record does not disclose any grounds whatsoever for waiving the requirement of a bond, and to have done so on this record was error.

The court likewise erred in granting the injunction without the plaintiff having received any notice thereof, or without the required showing that the giving of notice would have been unduly prejudicial to the defendant. Berenson v. Berenson, 34 Ill. App. 2d 376, 379 (1962); Streamwood Home Builders, Inc. v. Prolin, 25 Ill. App. 2d 39, 43-44 (1960). "The law does not favor granting injunctions without notice and, since injunction is an extraordinary remedy, an injunction without notice is most drastic and should only issue under extreme circumstances." Hollis v. Schneider, 77 Ill. App. 2d 420, 426 (1966).

No reason is apparent from the petition or the whole record, for not serving notice or for not furnishing bond. We cannot simply presume that such reasons exist, for "no presumptions are to be indulged in favor of action without notice." Berenson v. Berenson, supra.

Having concluded that the granting of the injunction without notice or bond was improper, on the facts before us, we find it unnecessary to discuss the alternative theories advanced by the plaintiff for reversal.

Reversed.

ABRAHAMSON, P.J. and MORAN, J. Concur.

NO. 67-123

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRI CT

MUTUAL SERVICES OF HIGHLAND PARK, INC., AN ILLINOIS CORPORATION, Plaintiff-Appellant, vs. S.O.S. PLUMBING & SEWERAGE COMPANY, AN ILLINOIS CORPORATION, Defendant-Appellee.	)	Appeal from the Circuit Court of Lake County, Magistrate Division, Nineteenth Judicial District of Illinois.

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT:

Plaintiff appeals from an adverse decision by a magistrate in a suit originally filed by plaintiff to recover for purchases made on open account by the defendant.

Plaintiff, a building materials supplier, filed suit for $1,086.80 for materials and supplies sold to defendant, a plumbing and sewer contractor. The defendant admitted the purchases and raised, as an affirmative defense, an alleged breach of implied warranty in the sale of 3-inch hammer and core bit.

In a bench trial before the magistrate it was determined that there was a breach of implied warranty and a set off in the amount of the account sued upon was allowed.

It would appear that in January of 1966 the president of the defendant corporation, a Mr. Stolar, advised the plaintiff through its secretary, Mr. Sheahen, that defendant

had a construction job at Fort Sheridan which would require the drilling of about 80, 3-inch, holes and he asked whether the Skil Manufacturing Company produced such a drill. Sheahen, whose company regularly sold Skil Manufacturing Company products, said that Skil did make such a drill.

In February of 1966, Stolar returned to plaintiff's business and talked to another of plaintiff's employees and to a Mr. Yerke, a salesman for Skil Manufacturing Company, who happened to be present at the time. Stolar said he needed a drill or hammer and bit for 3-inch holes. Mr. Yerke, the Skil salesman, stated that his company's No. 736 hammer and core bit would do the job and could withstand the vibration. Mr. Yerke said he had a demonstrator model and defendant purchased the used hammer and bit at a reduced price of $440.00. Plaintiff delivered the equipment, together with an instruction booklet and a written manufacturer's guarantee, to defendant and billed defendant for the purchase price as quoted. A few days later when defendant used the hammer and core bit the hammer housing cracked and the core bit broke.

The defendant took the broken hammer and bit back to plaintiff and was advised that plaintiff's organization could not fix it and that defendant should return the tool and bit to the Skil Manufacturing Company or one of its service centers for repair. The defendant did return the tool and bit to Skil who kept it for a few weeks and then quoted a $200.00 repair charge. Defendant picked up the hammer and bit from Skil without authorizing the repairs. Defendant later used a rental hammer and core bit furnished by plaintiff and also used a compressor rented from a general contractor on the job.

At the time of the trial before the magistrate the defendant still had the broken hammer and bit. The magistrate, after considering briefs furnished by the parties, found that there was no express warranty but there was an implied warranty of merchantability and that the "guarantee" in the Skil instruction book was not sufficient to disclaim the implied warranty.

The issues presented to us on appeal are whether or not there was an implied warranty, whether the written guarantee effectively constituted a disclaimer and whether the proof of damages on the set off was adequate and proper.

The statutory authority relevant to this case is found in Sections 2-314 through 2-316 of the Commercial Code (Ill. Rev. Stat. 1965, Ch. 26, Sec. 2-314 — 2-316), all of which are identical with the corresponding sections of the 1958 official text of the Uniform Commercial Code.

Under Section 2-314, a warranty of merchantability is implied in a contract for the sale of the goods if the seller is a merchant with respect to goods of that kind. To be merchantable the goods must be fit for the ordinary purposes for which such goods are used.

Under Section 2-315, if the seller knows of the particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select or furnish suitable goods,there may be an implied warranty that the goods are fit for the particular purpose.

Section 2-316 refers to disclaimer of warranty by a specific language of disclaimer and other means.

Our attention is first drawn to the problem of whether or not the hammer and bit were sold by plaintiff so as to make plaintiff a seller under Section 2-314. It appears that the agreement to purchase was made at plaintiff's place of business with an employee of plaintiff present at the time; that the price was quoted by plaintiff's salesman; that the delivery was made by plaintiff and that the purchase price was charged to defendant by plaintiff on an open account. We feel, therefore, that plaintiff, rather than Skil Manufacturing Company, was the seller of the products even though the item was a demonstrator's model and Mr. Yerke was present and participated in the conversation at the time of the sale.

It is apparent that plaintiff sold a general line of merchandise from Skil Manufacturing Company and although plaintiff did not ordinarily sell the particular hammer and bit in question it did, in fact, have such items on hand which it rented to customers. In fact, it furnished such to the defendant after the purchased items broke. Under Section 2-314, the magistrate was correct in finding that there was an implied warranty that the hammer and bit were fit for the ordinary purposes for which such goods are used.

We do not feel that the written guarantee constituted a disclaimer under Section 2-316. The guarantee provided, among other things: "No other guarantee, written or verbal, on our products is authorized by us." We feel the effect of the printed language was simply to prohibit any other party from making any further agreement in the name of Skil. It did not negate the implied warranty of merchantability on the part of the seller. See, Admiral Oasis Hotel v. Home Gas Industries, 68 Ill. App. 2d 297, 306 (1965).

We do not feel that the evidence would support a finding of implied warranty under Section 2-315 since there was no showing that the defendant relied upon the plaintiff's skill or judgment in selecting or furnishing suitable goods. The defendant knew what it wanted and had shopped other suppliers for such item prior to coming to plaintiff. There was no implied warranty for a particular purpose.

The next question is whether or not there was a breach of the contract. The magistrate heard the evidence offered and had an opportunity to examine the drill and bit which were present in court. His finding of fact was that a breach of warranty had occurred and we do not see fit to disturb this finding.

On the question of damages, however, we feel that error was committed. At the time of the trial the defendant still had possession of the tool. There was hearsay evidence offered, without objection, that Skil Manufacturing Company had quoted a figure something over $200.00 to repair the equipment.

Ordinarily,the measure of damages to personal property is the reasonable cost of making repairs. If, however, the property, after the repair, is worth less than before the damage, the measure of damages would be the difference in market value before and after, in addition to the reasonable cost of repairs. Since the plaintiff elected not to repair the hammer and tool bit, the first rule above stated should apply relative to damages allowable as a set off to plaintiff. Lucas v. Bowman Dairy Co., 50 Ill.App. 2d 413, 416-417 (1964); Janicek v. Szmitke, 48 Ill. App. 2d 214, 216 (1964).

There was proof that after the equipment broke plaintiff loaned similar equipment held for rental purposes to the defendant to use on the same job. There was no proof that that equipment was not available either on a loan or rental basis to complete the job. The president of the defendant corporation testified over objection that he was charged some $800.00 by the general contractor on the job for the use of a compressor which was used to drill holes larger than three inches in diameter and that the larger holes were then repacked to the desired size. There was no offer of any evidence as to the reasonableness of the charge made by the general contractor nor was there any document of any sort substantiating the charge offered. The testimony concerning the $800.00 was improper and plaintiff's counsel properly objected thereto.

It appears,therefore, that the only damage properly proved, since there was no objection to its offer, was $200.00 for the repairs to the drill and bit. Defendant is entitled to possession of the damaged equipment.

The cause should be remanded to the magistrate for the entry of the judgment in favor of the plaintiff in the original amount of its claim less $200.00 to be allowed as a set off to the defendant.

REVERSED AND REMANDED.

Abrahamson, P.J. and Davis, J. - Concur.

No. 51645

HENRY SASSO, Plaintiff-Appellee,	)	APPEAL FROM THE
v.	)	CIRCUIT COURT
GEORGE KITA, Defendant-Appellant.	)	OF COOK COUNTY.

MR. JUSTICE MC NAMARA DELIVERED THE OPINION OF THE COURT.

Defendant, George Kita, appeals from a judgment entered in the Circuit Court awarding damages to plaintiff, Henry Sasso. The complaint stated that the two parties entered into a contract for the exchange of real estate; that plaintiff transferred his property to defendant, but that defendant failed and refused to convey his property to plaintiff; that defendant failed to pay the mortgage on the property conveyed by plaintiff; that as a result, the property was foreclosed; by virtue of this foreclosure and plaintiff's prior conveyance, he suffered damages in the sum of $50,000. Defendant in his answer contended that plaintiff knew defendant was only a nominee of the property to be conveyed; that at the time of plaintiff's transfer he was already in default on the mortgage and that the mortgagee had executed its assignment of rents; that defendant performed all conditions he was required to do; and that plaintiff sustained no injuries. After a trial without a jury, the court entered judgment for plaintiff in the sum of $5,500, and later reduced it to $3,000.

Certain facts are not in dispute. Plaintiff and defendant, both lawyers, first met at plaintiff's office on June 18, 1962, at which time they signed a contract for the exchange of real

estate. Four other parties were present at this meeting. None was called to testify. The contract had been drafted previously by a real estate broker, but was completed at the time of the meeting by filling in defendant's name as party of the second part. Titles to both parcels of land were held in trust, that of plaintiff by the Cosmopolitan National Bank, and that of defendant by the Harris Trust and Savings Bank. Plaintiff's property was located at 333-335 West Madison Street in Chicago, and defendant's property consisting of 5 partially constructed 6 flat buildings was located in Villa Park. On the same date, the parties also exchanged assignments of beneficial interest to the respective properties. The contract recited that plaintiff was owner of 100 per cent of the beneficial interest in the Cosmopolitan trust, while it set forth that the beneficial interest in the Harris trust had been conditionally assigned to the Concord Savings and Loan Association, the construction money mortgagee, until September, 1964. The contract further recited that plaintiff took title subject to that assignment to Concord. At the signing, plaintiff submitted a guarantee policy of the Madison Street property, while defendant submitted a letter of opinion which indicated that Richard Dale Homes Inc., the construction contractors had applied for title in the Villa Park property. After execution of the contract, plaintiff took defendant's assignment to the Harris Bank to get its acceptance. On June 20, Harris notified plaintiff that it could not recognize or accept the assignment because defendant had no interest in the property. Subsequently, at the behest of plaintiff, the parties and a representative of

Concord met at the Harris Bank. The purpose of this meeting was to work out arrangements so that plaintiff eventually would become owner of the beneficial interest of the Villa Park property. It was agreed at this meeting that certain documents necessary to complete the exchange of beneficial interest certificates would be executed by various parties. However, the transfer of the Villa Park certificates was never completed.

At the time of the execution of the contract, plaintiff was several months in arrears in mortgage payments, and had not paid the general taxes for two years. Within five days, the right to the assignment of rents was exercised by Republic Savings and Loan Association, mortgagee of the Madison Street property. Foreclosure proceedings were instituted in July, 1962 and subsequently, a decree of foreclosure was entered. Both plaintiff and defendant were made parties to the foreclosure. Defendant filed an appearance and answer. Plaintiff testified that he was aware of the proceedings.

In addition to the above undisputed facts, plaintiff testified that he believed defendant to be the owner of the beneficial interest of the Villa Park property, otherwise he would not have entered the contract. He did not learn that defendant was a nominee until notified by the Harris Bank on June 20. He relied on the representations of the defendant that the deal was proper. He also testified that the meeting with defendant and the representative of Concord at the Harris Bank resulted in the defendant's promise to get additional documents executed, but that there were no additional acts to be performed by plaintiff. After this

meeting, he called defendant continuously to find out when the assignment would be executed. Finally, he told defendant he could wait no longer and requested defendant to return the assignment of the Madison Street property. Defendant refused to do so. Plaintiff received a letter in November, 1962, from Concord advising him that mortgage payments were due. He again asked defendant to return his assignment, stating that since he had never received title to the Villa Park property, he could not be responsible for payments on the mortgage. Defendant again refused to return the assignment. Plaintiff was told at the time of the execution of the contract that the mortgage arrearage on the Madison Street property was of no concern to defendant because he intended to pay the entire mortgage balance immediately.

For the defense, Raymond Heiderscheidt, treasurer of Concord, testified that he met with the two parties at the Harris Bank. It was agreed that Richard Dale would pass a corporate resolution authorizing an assignment and would also execute an assignment of its beneficial interest in the Villa Park property to defendant, and that defendant would then execute an assignment to plaintiff. It was further agreed that Concord would permit the transfer of the beneficial interest to plaintiff, and that plaintiff would reassign the interest to Concord in order to maintain it in its original position. In this reassignment, Concord agreed to set forth plaintiff's rights to collect the rents and to sell his interest in the property. Concord also agreed to release the beneficial interest if plaintiff main-

tained the mortgage payments for two years. Thereafter, Richard Dale passed the necessary resolution and executed an assignment to defendant. Defendant then executed an assignment to plaintiff. These three documents which were admitted in evidence at the trial were delivered to Concord. Concord also prepared an assignment to Richard Dale, a reassignment from plaintiff to Concord, and a letter of agreement running between plaintiff and Concord. Concord sent two letters to plaintiff, one by registered mail, asking him to execute these documents, but never heard from him. After Concord was notified that 2 of the buildings in Villa Park were ready for occupance, it notified plaintiff that unless the documents were executed and the mortgage payments made, it would consider that plaintiff was forfeiting his interest.

Defendant testified that at the time of the time of the execution of the contract plaintiff was told that Richard Dale was the owner of the beneficial interest, that it would see that the proper documents were signed, and that he was present on behalf of that corporation. Defendant signed the contract only after a discussion with plaintiff that a corporation would not be a proper party to a contract for the exchange of real estate. After meeting with plaintiff and Mr. Heiderscheidt at the Harris Bank, he delivered the documents executed by Richard Dale and himself to Concord. Plaintiff subsequently told defendant that he was tired of waiting and wished to have his assignment returned. Defendant refused because he and his clients had performed all the conditions necessary.

After hearing the evidence, the trial judge made several comments. He stated that defendant and Concord had prepared and executed the necessary documents after the meeting at Harris. He stated that Concord was entitled "to be put in status quo". The judge also stated that the plaintiff would not sign these papers, adding that "I don't know who was responsible for it not being done". He went on to comment that he did not see any clear breach of contract. However, he believed that plaintiff was "misused; that defendant had a duty to give his property back, and so there is a breach of contract here".

It is within the Appellate Court's scope of review to determine whether the judgment is sustained by the evidence or is against the manifest weight of the evidence. Ill. Rev. Stat. 110A, Par. 366, (b)(2). Where a trial was had without a jury the findings will not be reversed except for a clear abuse of discretion or, except if the trial court's findings are clearly and manifestly against the weight of evidence. Ritter v. Jansen, 80 Ill. App.2d 169, 224 N.E.2d 277 (1967); Knorr v. White Brothers Trucking Co., 79 Ill. App.2d 471, 224 N.E.2d 299 (1967). We believe that the judgment in the instant case is clearly and manifestly contrary to the manifest weight of the evidence. The contract recited that the beneficial interest in the Villa Park property rested in Concord until 1964. The treasurer of Concord testified that, as a result of the agreement between the parties at Harris Bank, Richard Dale passed a corporate resolution authorizing the assignment of their interest to the defendant, that defendant executed his assignment to plaintiff, and that all of these documents were being held at Concord. He

also testified that Concord had prepared a reassignment from plaintiff and a letter of agreement as to the rights of plaintiff. In his summation at the conclusion of the testimony, the trial court found that in fact defendant and Concord had prepared and executed the above documents. The court also found that Concord was entitled to be maintained in its same position. The court finally found that plaintiff did not sign the necessary papers to complete the agreement. These findings by the court were completely justified in view of the testimony and the exhibits introduced at the trial.

As a result of those findings by the court, it is clear that defendant had performed every condition required of him under the terms of the agreement. He had done everything possible to effectuate the transfer of the Villa Park property to plaintiff. Consequently, he was under no duty to cancel the transaction and return the assignment upon the belated request of plaintiff. The exchange of real estate was not completed only because plaintiff failed to execute the reassignment, and he is not entitled to damages.

For the foregoing reasons the judgment of the trial court is reversed.

JUDGMENT REVERSED.

BURKE, P.J. and LYONS, J. concur.